IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN WIGGINS, :

Petitioner :

v. : No. 02-311

SEWALL SMITH, WARDEN, ET AL. :

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Washington, D.C.

Monday, March 24, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

GARY E. BAIR, Solicitor General, Baltimore, Maryland; on behalf of the Respondents.

DAN HIMMELFARB, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 02-311, Kevin Wiggins versus Sewall Smith.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE PETITIONER

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

Under the clearly established law of Strickland v. Washington, a lawyer's decision about how to defend a client facing a death sentence must be supported either by a thorough investigation or by a reasonable professional judgment supporting limitation on investigation.

In this case, the Maryland Còurt of Appeals and the Fourth Circuit applied that rule in an objectively unreasonable manner. Kevin Wiggins' lawyers did not fulfill what this Court described in Williams against Taylor as their obligation under Strickland to investigate thoroughly their client's background, and no reasonable professional judgment in fact supports or could support their failure to do so.

QUESTION: Do you think the Williams case is a white horse for you, that is, I mean, that it is exactly identical to this case?

MR. VERRILLI: I do not think it's exactly identical to this case, Your Honor, but we think it clearly informs this case both by explaining what an -- what an objectively unreasonable application of Strickland amounts to and in emphasizing the critical importance of investigating a -- a -- your client's background as -- as a prerequisite to making informed, reasonable choices about how best to defend your client.

QUESTION: But -- but wasn't Williams decided after the Maryland Supreme Court's opinion here?

MR. VERRILLI: Yes, it was Justice Scalia, but --

QUESTION: So, therefore, it can't be used for purposes of deciding whether what Maryland did was an unreasonable application of then-existing Federal law.

MR. VERRILLI: I disagree with that, Justice Scalia, for the following reason. Williams, like this case, was an AEDPA case and all Williams could do was decide whether Strickland had been unreasonably applied. Williams was -- because Williams was an AEDPA case, was a 2254(d)(1) case, Williams could break no new ground by definition, and therefore, the -- the fact that Williams concluded what it did about Strickland's requirement, means that that is what Strickland requires. And that -- and -- and so we don't think it -- we're going beyond

AEDPA in the least.

QUESTION: You go back to Strickland and you can't find the principle that you're now enunciating.

MR. VERRILLI: Oh, no, no. I disagree with that, Mr. Chief Justice. We think it's right on page 690 and 691 of -- of Strickland, and here's the principle that we think -- Strickland specifically says, as we read it, that a lawyer's judgment about how to defend a client has either got to be based on complete investigation or, if it's based on less than complete investigation, it's reasonable only to the extent that reasonable professional judgment supports the limitation on investigation. That's the rule.

QUESTION: Last year in Bell -- Bell versus Cohen -- Cone, we stressed that it is à tremendously deferential regard that we have to the lawyer's action in a case like that.

MR. VERRILLI: Yes, but there's a fundamental difference between this case and Bell v. Cone, Mr. Chief Justice, and it's this. Bell v. Cone was not a case about the failure to investigate. That was purely a case about counsel's decisions about what information to present to the sentencer after having done what was indisputably a thorough investigation.

And the reason that's critical is because as --

as we read Strickland, the whole point of the deference given to counsel's choices about what to present is premised on the adequacy of the investigation that precedes them. That is what the source of the deferential stance towards presentation is. It's the adequacy of investigation.

QUESTION: Is that what this case is about, Mr. Verrilli, about failure to investigate?

MR. VERRILLI: This case is about both, but it's principally about --

QUESTION: It would seem to me if it were, you would have to establish pretty clearly that counsel did not know these many things that you say he did not know. And in fact, counsel was never asked the question, did you know this, did you know that, did you know -- we don't know what counsel --

I -- I'm looking at the joint appendix on page 490. He knew a lot of these things. He's -- he's -- he's asked did you know that Wiggins had been removed from his natural mother as a result of a finding of neglect and abuse when he was 6 years old? Yes, he says, I knew that. That was in the social service records. So you knew it. Yes.

You also knew that there were reports of sexual abuse at one of the foster homes. Yes, he knew that.

You also knew he had his hands burned as a child as a result of his mother's abuse of him. Yes, he knew that.

You also knew about homosexual overtures made towards him by his Job Corps supervisor. Yes.

And you also knew he was -- he was borderline mentally retarded. Yes.

Now, that -- that examination could have -- could have gone further, but you didn't know, did you, this, this, this, this, and this. There's no examination like that. We know that he knew many things about this person's background, but we don't know that he didn't know the rest of it.

MR. VERRILLI: I disagree with that, Justice Scalia.

QUESTION: Well, how do we know that he didn't know it?

MR. VERRILLI: Well, here's how. There -- there are two absolutely compelling reasons, but before I get to them, I think it's important to look at the very next thing that the lawyer says in that colloquy. And the very next thing the lawyer says is, well, yes, at least I knew what was reported in other people's reports. And that is what led the Maryland Court of Appeals to the conclusion it reached, which was that the social service records and

the pre-sentence records, other people's reports, contained that information, and we have shown by clear and convincing evidence that they do not.

But there are two additional points that are critical here, and the first one is this. The trier of fact, the actual judge who heard that testimony --

QUESTION: I -- I have to correct you. That -- he -- he didn't say that all of this that he knew he only knew because it was in other people's reports. The question was -- he had just said -- and you also knew that he was borderline mentally retarded. Yes.

He -- then another question is begun. You knew all -- he interrupts the question and he says, at least I knew that as it was reported in other people's reports, yes. The that was the fact that he was borderline mentally retarded.

MR. VERRILLI: Justice Scalia, that is not how the --

QUESTION: That's how it reads.

MR. VERRILLI: -- Maryland Court of Appeals read it. It is not how the Fourth Circuit read it.

QUESTION: The court of appeals and the Fourth Circuit must have read it wrong because that's the way it reads.

MR. VERRILLI: But -- but, Justice Scalia, what

matters here for AEDPA purposes under (d)(2) is whether the court of appeals based its determination on an unreasonable factual finding, and there are two -- there are two critical indicia here that it did. The first one -- the first one is this. Well, there are three.

First, the records don't contain the information.

Second, the trier of fact, the judge who heard this testimony, concluded -- and this is at page 605 and 606 of the joint appendix -- that Mr. Schlaich, the lawyer who gave that testimony, did not know what was in the social -- what was in the social history subsequently prepared.

QUESTION: This was in the trial itself or in a State habeas proceeding?

MR. VERRILLI: In the State habeas proceeding, Your Honor. His -- at the conclusion of his testimony and during closing argument by the -- by the government in that State habeas proceeding, the -- the trier of fact who heard the testimony, could assess demeanor, could assess credibility, heard all the other evidence, saw all the other evidence, concluded that he didn't know and found it was error.

And then -- and the next point that we think conclusively demonstrates that -- that the lawyers did not

know is this. Remember that -- that at the close of the sentencing proceeding, not the post-conviction proceeding, Mr. Chief Justice, but the actual sentencing proceeding, counsel for Wiggins made a proffer of what mitigating evidence they would have submitted to the sentencing jury had their motion to bifurcate been granted. That proffer doesn't mention any of the mitigating evidence that -- that we have shown in the social history. It doesn't mention the terrible abuse of the first 6 years of his life. It doesn't mention the horrible burning incident. It doesn't mention the sexual abuse. It doesn't mention the homelessness. There's no conceivable reason why counsel would have withheld all of that information from its proffer at the conclusion of the sentencing phase of the proceeding if counsel knew that and could --

QUESTION: So that counsel referred to other people's reports and other reports. Can we draw any inference from the record that there were some reports other than the -- I take it it's the social -- social services report?

MR. VERRILLI: Well, I think there was --

QUESTION: And the pre-sentence and social --

MR. VERRILLI: Pre-sentence.

QUESTION: -- and social services? Were there any other documents that --

MR. VERRILLI: The -- there is a document which the State has lodged which indicates that there were transcripts of interviews with family members. Those aren't in the record, but I think the same exact analysis, the same exact inference has to be drawn. If those had included the kind of terrible descriptions of -- of abuse, it would have shown up in the psychologist's report because, after all, what that document shows is the psychologist got those interviews and it would have shown up in the proffer because that is the most --

QUESTION: And -- and the psychologist's is the social -- social services report.

MR. VERRILLI: No. That's separate --

QUESTION: That's a separate report.

MR. VERRILLI: That's a separate --

QUESTION: That's exactly my -- look, there is a document here called lodging and it says, Baltimore City Department of Social Services Department File. Now, in looking through it briefly, I cannot find in it all the references that you say are not in it.

MR. VERRILLI: They are --

QUESTION: I don't think they're there.

MR. VERRILLI: They are not there.

QUESTION: But this says, other people's reports, and I'm perhaps going to hear in about 20 minutes

from now that there could be other reports to which he was referring which are not in this document and which might be those other -- those other interviews with other people, et cetera. In other words, I don't want you to sit down -- it's -- it's one thing if I'm supposed to look at this document and say did this lawyer investigate the background, and the answer I think would be no. But it's quite another thing if he knew all kinds of other things from other sources, namely about the burned hands, all the things you've listed. So I want to be sure.

Now, you're referring me one other thing, the proffer. But in respect to the proffer, since I've read the briefs, I suspect I will hear the following. Of course, he didn't want to proffer this. His strategic decision was to make the jury think thàt this man might not have done it, and the more lunatic we make him sound, the more the jury is going to think the opposite.

MR. VERRILLI: Justice Breyer, let me -- let me --

QUESTION: Or I suspect I'll hear that because I've read it.

MR. VERRILLI: Let me address --

QUESTION: So I would like you --

MR. VERRILLI: Let me address that directly because I think this goes to the essence of why the

Maryland Court of Appeals judgment was an unreasonable application of -- of the Strickland rule, and it's this.

The proffer occurred in the following context. Counsel for Wiggins made a motion to bifurcate the sentencing proceeding so that they could first retry the factual case of eligibility, and then if they lost, they could then put on the full-blown mitigation case.

QUESTION: That would have involved the principal issue had they -- as a separate --

MR. VERRILLI: Right. Bifurcation would have first involved the principalship, and then had principalship been established to the jury's satisfaction, they would have moved to the issue of mitigation. And the -- and the trial judge denied that motion. Now, he denied that motion -- this is critical`-- on the first day of the sentencing hearing. So up to the first day of the sentencing hearing, Kevin Wiggins' lawyer's strategy was obviously to prepare both a principalship case and a mitigation case because they made a motion that was designed to allow them to do precisely that. So there is no conceivable justification for them to have failed to do everything a reasonable lawyer would have done to develop a mitigation case.

And they -- and what the proffer shows -- I'm afraid the proffer cannot, Justice Breyer, be explained on

the basis that Your Honor described for this reason. The point of the proffer -- the point of the proffer was to show the judge and to create a record on appeal of what they would have shown had the bifurcation been granted and they could have tried their mitigation case. This proffer was their mitigation case.

QUESTION: What about the first part which was Justice Kennedy's part, I think so far all of our parts -- questions, which is when you read just the part that Justice Scalia read to you -- and he says it's on the basis of other people's reports -- will the other side concede or how do we know it's -- what he's referring to is this document rather than some other set of documents?

MR. VERRILLI: Well, I think what's critical in that regard is what the Maryland Court of Appeals found because what AEDPA requires deference to is factual findings made by a State court. And what the -- and the factual finding that the Maryland Court of Appeals found -- made is on page 121 of the appendix to the petition in the -- in the second paragraph there. It -- it says, counsel was indeed aware of Wiggins' unfortunate background. They had available to them not only the pre-sentence investigation, but detailed social service records documenting sexual abuse and physical abuse.

That is the sum and substance, the total, of

what the Maryland Court of Appeals said in terms of the facts here. It's the sole factual finding. That factual finding --

QUESTION: Did it say, and nothing else? Did it say, and nothing else?

MR. VERRILLI: It said --

QUESTION: You're -- you're making it as though it was a factual finding that this is all that he knew. Now, they knew that he knew that, but they didn't make a factual finding that he didn't know anything else.

MR. VERRILLI: They -- the factual -- the only factual finding they made -- the only -- the only -- the only thing that supports and explicates the general statement at the outset of that paragraph that they were aware of his unfortunate childhood is the specific factual finding that the social service records documented sexual abuse and documented physical abuse. We've shown by clear and convincing evidence that that finding is wrong.

And then under (d)(2) in AEDPA the question is whether the Maryland Court of Appeals' judgment was -- was based on an -- an unreasonable factual determination. And we've shown that the only thing that they found --

QUESTION: Mr. Verrilli, I'd like to come back to the habeas -- the State habeas decision that you -- that you cited us to, which is on the joint appendix

page 604. Now, as I understand it, if you're making a claim of failure to investigate, the burden is on you to show that counsel did not know things that he would have learned on investigation. The burden is on you.

As I read this court's decision, what the court is simply saying is, I don't ever remember a death penalty case where there was not a social history done. And so it was simply unthinkable not to have a social history.

Then when you go across the page, so, therefore, based upon the evidence that I have seen, I'm concluding it was error for them not to investigate it because I don't have any information before me to believe that they did not have this information available to them.

You see the context? And I understand what you're saying, but the context of this`case is that I have no reason to believe that they did have all of this information. That's not -- that's not enough to satisfy your burden. That court would have had to find I believe that they did not have this information, not I just have no reason to believe that they had it.

MR. VERRILLI: But --

QUESTION: The court should have had to find they did not have this information. It doesn't find that. It just says I have no reason to believe that they had it.

MR. VERRILLI: Justice Scalia, I disagree. I do

not think that is a reasonable reading of what the trial judge held. What the trial --

QUESTION: You -- you tell me what it means. It says --

MR. VERRILLI: The trial --

QUESTION: -- I have no reason to believe that they did have all of this information.

MR. VERRILLI: The trial judge said that he was concluding that it was error not to investigate. If they knew the information, it wouldn't have been error not to investigate and --

QUESTION: No. Earlier the -- the trial judge says, I just don't think -- I -- I don't know any capital --

MR. VERRILLI: With all due respect, Justice Scalia --

QUESTION: -- I don't know any capital case in which a social history wasn't done.

MR. VERRILLI: With all due respect --

QUESTION: I think he -- I think he reversed simply because you're always supposed to do a social history.

MR. VERRILLI: With all due respect, Your Honor, the very sentence that you pointed to said, based on the evidence that I have seen, I'm concluding it was error for

them not to investigate it. If they knew the information, he never would have reached that conclusion.

QUESTION: No. He reached the conclusion because --

MR. VERRILLI: And that's completely supported by the proffer.

QUESTION: He reached the conclusion because he --

QUESTION: No two voices at the same time. Justice Scalia is asking you a question.

MR. VERRILLI: Excuse me.

QUESTION: He reached the conclusion because he said, I have no reason to believe that they had the information. He never made the finding that they didn't have it.

MR. VERRILLI: I think that's implicit, Justice Scalia, in his conclusion that it was error not to investigate, and I think it's completely confirmed by the proffer which didn't include any of this information and for which there would have been absolutely no explanation for its exclusion. Absolutely none whatsoever. So I think with respect to the -- to the factual finding that the Maryland Court of Appeals made, that the social services records documented abuse and provided the source of his knowledge, that's clearly erroneous.

QUESTION: Mr. Verrilli, you said absolutely no reason why it wouldn't come in if they had it. Why couldn't counsel for the defense think if we introduce this, it's going to be subject to cross examination? And if we look at that social history, we find out that the whole thing is -- the defendant himself was the source of the information about the horrible sexual abuse he had been exposed to as a child. The jury might find that a person who had been so abused would be full of hate and therefore very likely would have had the mental state to carry out this brutal murder that -- in other words, that this kind of information could be a two-edged sword. The jury could infer from it he's not fully responsible for his acts or, on the other hand, that this person was violent, full of hate, and indeed committed this brutal murder.

MR. VERRILLI: Well, I think, Your Honor, I'm going to answer Your Honor's question directly, but I -- I need a minute to do it.

QUESTION: Yes.

MR. VERRILLI: The question under Strickland, it seems to us, is that once you've concluded that there was a failure to investigate adequately, the question is whether there is a reasonable probability that the outcome would have been different as a result of that failure.

And in this case, it seems to me, that means that what we -- and Strickland also stresses that that is an objective test. That is not based on the idiosyncracies of the individual decision makers. It's an objective analysis.

And so the question here is whether had this information been investigated, if it was in the hands of competent counsel, is there a reasonable probability that competent counsel would have used it and introduced it, and then is there a reasonable probability that it would have affected the sentencing jury's outcome.

And the second half of that analysis, it seems to us, is answered a fortiori by Williams against Taylor.

The first half of that analysis seems to us clearly to support relief here because, as I take Your Honor's question, it's a question of, well, there might be a justification for not submitting this evidence to the jury. Yes, there might. We think in a case like this one, it would be an unreasonable choice not to do so because this evidence has so little of what this Court has described in other cases like Burger and Darden as a sharp double edge, and it is so powerfully mitigating that we don't think it would have that effect.

But we -- we respectfully suggest that's not the relevant question. Once you've established deficient

performance with respect to investigation, then we shift to the prejudice inquiry, and it's an objective analysis. And so long as there is a reasonable probability that competent counsel would have used this information in combination with the case that they made, then -- and there's a reasonable probability that the outcome would have been affected, which I think Williams v. Taylor establishes for us, then we have shown what we need to show to be entitled to relief.

QUESTION: Do you --

QUESTION: What are the --

QUESTION: What do you think the test is that Williams against Taylor lays down as to determining a -- a probability of a different outcome?

MR. VERRILLI: Well, I think, if I may just draw from Justice O'Connor's concurring opinion with respect to that. If there's an obvious failure on the part of the State court to consider the totality of the record, that's an unreasonable application with respect to prejudice. And with -- in Williams, of course, as Your Honor's dissenting opinion pointed out, there was a much more severe case of aggravating information than here. Williams had a terrible, long record of violence. Wiggins has none. And the mitigating evidence here is even stronger than the mitigating evidence that existed in the

Williams case.

And so we think it follows directly from Williams that -- that if you look at whether there's a reasonable probability that the outcome would have been different here on the basis of submitting this evidence, that we think that's a very clear and easy case under the standards that Williams sets.

QUESTION: Are -- are you making any argument that the ruling on the bifurcation motion might also have been different if there had been a proffer of this? Or did the judge rule on the bifurcation motion without knowing what the mitigation evidence might be?

MR. VERRILLI: The -- factually, Justice Kennedy, it's the latter. The -- he ruled on the bifurcation motion at the outset of thè -- of the trial.

QUESTION: Is -- is that a common motion in Maryland capital cases, to try to bifurcate the sentencing proceeding?

MR. VERRILLI: At the time it was, and the reason it was, Mr. Chief Justice, is because sometime shortly before this case was tried in Baltimore County, another Baltimore County judge had allowed such a motion.

And we think that fact reinforces the utterly unreasonable character of the failure to investigate here. These lawyers had a -- had -- had to think there was a

reasonable prospect they were going to be able to put on a mitigation case, but we know that all they had to put on that mitigation case was the psychologist's testing. And after all, that -- all that psychologist did was test.

QUESTION: But they would -- they would be fighting over the principalship too, would they not?

MR. VERRILLI: Yes, but that -- the point of bifurcation was to do principalship first, and if they prevailed on principalship, they wouldn't go to the second phase. And only if they didn't prevail on principalship would they go to the second phase where they wouldn't have any of the tactical cross currents they were worried about because principalship was already established and they could go whole hog and make the fullest mitigation case possible.

And the fact that they were -- that they were endeavoring to follow that strategy until the first day of the sentencing hearing, October 11th, 1989, shows that they didn't -- that all they had as of October 11, 1989, was the psychologist's report -- shows that they did not investigate at the level that Strickland requires.

QUESTION: Mr. --

QUESTION: What about the psychological reports, Mr. Verrilli? Those were available to defense counsel?

MR. VERRILLI: Yes, Justice O'Connor.

QUESTION: And indeed, obtained by defense counsel.

MR. VERRILLI: Yes, Justice O'Connor.

QUESTION: And what did they reveal in this area of mitigation?

MR. VERRILLI: They were -- the -- the -- there are two things that are important about the psychologist's report: one, what it does contain; the other, what it doesn't contain.

The psychologist was commissioned in this case to do testing of Mr. Wiggins, intelligence testing and then psychological profiling, MMPI-type testing. The evidence is undisputed about that. That's what the psychologist did.

The thing that's significant`about what was discovered was the fact that Mr. Wiggins was of borderline intelligence, which seems to us quite relevant and entirely consistent -- it would have been entirely consistent, even absent bifurcation, to use that evidence, in addition to an effort to disprove principalship, because the borderline intelligence would easily and strongly have supported the conclusion that Mr. Wiggins was an accomplice and not a principal.

But the thing it doesn't show is any of the history of abuse, and that's because the psychologist

wasn't commissioned to do that. They didn't do what they needed to do here, which was to do the social history. The evidence is clear that it was routine practice in these public defenders' office to do the social history. They admitted that. The evidence is clear -- and the -- and the public defenders admitted it -- that funds were available for that purpose. They just didn't do it. They just dropped the ball on this. They didn't do what all the lawyers in their office did routinely, and they didn't do what the State post-conviction trial judge said he had never seen not done, which is prepare this social history and --

QUESTION: Mr. Verrilli, is -- is there any evidence, one way or the other, as to whether defense counsel simply sat down with the defendant and said, tell us about your background and what has happened to you in your life? Is there any evidence one way or the other about that?

MR. VERRILLI: There is not. There is not, but it wouldn't be a surprise, Justice Souter, that even if an interview like that occurred, that the defendant would not have revealed it, that -- it's very difficult to get this kind of history of horrible personal abuse out of a defendant. It very often requires a professional to do it. That is why -- that's the very reason why the social

workers are brought in to do the kinds of social histories as a -- as a routine matter. And it wasn't done here.

If there are no further questions, I'd like to reserve my remaining time.

QUESTION: Very well, Mr. Verrilli.

Mr. Bair.

ORAL ARGUMENT OF GARY E. BAIR

ON BEHALF OF THE RESPONDENTS

MR. BAIR: Mr. Chief Justice, and may it please the Court:

I'd like to first start with a correction in the factual record in this case. Counsel for petitioner has -- has referred the Court to JA605 and 606. And indeed, that was a comment made by the post-conviction court during the State post-conviction proceedings. However, that was an oral comment from the bench in April of 1994.

The post-conviction court's written opinion did not issue until 1997. And in the post-conviction written opinion -- it was a 257-page written opinion. And that written opinion basically countermanded and superseded and disavowed the statements that are on page JA605 and 606. If you look to page 137a of the appendix to the petition for writ of certiorari, that is where you have the excerpts from --

QUESTION: What page? What --

MR. BAIR: 137a, Your Honor. That is where you have the excerpt from the State habeas, State post-conviction court's written opinion. And if you look at footnote 261 on that page --

QUESTION: These are footnotes in the State court's opinion or footnotes in the -- in the appendix?

MR. BAIR: This is in -- these are footnotes in the State post-conviction court's opinion. It was, as I said, a very lengthy opinion and had several hundred footnotes as well as 257 pages.

By the time the post-conviction court rendered its final decision, its written decision, it had the transcripts from the post-conviction proceeding. And -- and as you may recall, the post-conviction proceeding lasted 5 months. Testimony was taken over 7 days in a 5-month post-conviction hearing.

That footnote 261 is the transcript that Justice Scalia was referring to which is on JA490 and 491. So this is the testimony that the post-conviction court used to make its fact finding. And in its fact finding it said Schlaich had more information than appeared in the PSI report.

I would go back to what was said earlier. There were several sources of the information for trial counsel.

In fact, I would -- I would tally them up to be six different sources. You had, obviously, the DSS reports, the lodged material that Justice Breyer referred to, 220 pages of social background, educational background, medical background, because petitioner was in foster care from when he was about 6 years old to when he --

QUESTION: Let me just get one thing straight on the -- the long footnote that you quote. They end up saying, you knew all this and you did not get a social history. Do you think it was -- a competent counsel would have gotten a social history or not knowing what he said he knew?

MR. BAIR: I think he got a -- he -- he got a social history in a different way, Your Honor. He didn't hire a forensic social worker. Instead, he obtained lengthy DSS reports, hired a psychologist, hired a criminologist, talked to family members, talked to the client. He didn't do it in the way that -- that counsel now says it should have been done.

QUESTION: Is -- is the way that counsel says it should have been done the way that lawyers typically do it in -- in Maryland?

MR. BAIR: I think they do it in different ways, Your Honor. I think -- I think sometimes they use forensic social workers. Sometimes they use

psychologists.

QUESTION: But they're wrong to tell us that they normally use social workers. Is that right?

MR. BAIR: I think --

QUESTION: That was -- his representation was that this case is unique because every other member of the defense bar routinely gets the social history. Are you -- is that right or wrong?

MR. BAIR: I think it's wrong. I think it's wrong, Your Honor. I think that lawyers in Maryland use psychiatrists, they use psychologists, they use social workers, they use combinations thereof.

QUESTION: But he didn't use any of these.

MR. BAIR: Pardon me?

QUESTION: He didn't use any`of those.

MR. BAIR: He -- he used a psychologist and he used a criminologist. And he obtained very lengthy DSS records.

QUESTION: If -- the DSS records that he obtained -- are they all in the lodging or there are some other ones?

MR. BAIR: Yes. They're all -- they're all in the lodging.

QUESTION: Okay. Now, if -- if -- it's 5 months -- it took 5 months. They went into this in

great care. You've given us the lodging. I've looked through the lodging, my law clerk more thoroughly. I can't find a word about the sexual abuse. I can't find a word about the frightful things that he -- one I did find where it said for -- when he was taken from his mother at age 6, it's true that the mother hadn't fed him for 2 days. All right. That's there, but none of this other stuff is there.

And -- and, indeed, if he looked at any of -- anywhere for this other stuff, where would he have looked? Why wasn't that in the record which took 5 months, if in fact he looked? Why was there no more reference to it than an ambiguous statement where he seems to refer to the lodging?

MR. BAIR: Your Honor, a coupòle of -- a couple of points to be made.

First of all, I -- I agree, and I think we state in our brief, there is no specific reference to sexual abuse in those -- in -- in the lodging.

QUESTION: And that's actually -- to me that's the most serious thing there is, I mean, in terms of shaping an individual who could later turn out the way that some have turned out. And -- and there is -- it was horrible in this case, and -- and there's absolutely no reference whatsoever that I can find that suggests that

this lawyer even knew about it.

MR. BAIR: Well, there is, Your Honor. That -- that goes back to JA490 and 491.

QUESTION: He said he knew about it.

MR. BAIR: But the lawyer explicitly testified that he knew of it.

QUESTION: And what was -- that's why I want to know since -- since that statement, the two pages out of 5 months, when I read them -- people can characterize them differently, but it seemed to me ambiguous, and the written reports could have easily referred to what I call the lodging. But if they didn't refer to the lodging, what did they refer to?

MR. BAIR: The written reports and -- and I think the reports of others could be either written reports or oral reports. I think --

QUESTION: What he said was -- what did he say? He said, in other people's reports. Yes, they could have been. So I would like to know. There's been 5 months of trial, as you said. There have been endless proceedings. In your opinion, what did they refer to if, in fact, they did not refer to the lodging? Because if they did refer to the lodging, the lawyer in those two pages out of the 5 months simply made a mistake, repeating what he knew later and thinking that he had learned it earlier from the

lodging.

MR. BAIR: Your Honor, again, two -- two points to be made. One is if there is any ambiguity or any lack of a record here, I think under Strickland that inures to the detriment of petitioner. He had the burden at this hearing to rebut the -- the strong presumption of competence, the strong presumption of reasonable conduct.

But let me go back to what the reports were. You had reports from the client. And I think, although, as -- as was asked earlier by Justice Souter, there's nothing in the record to say whether he spoke to his client. I think we can infer that he spoke to his client. He represented him for close to a year. Counsel for petitioner at post-conviction never pursued those lines of questioning. So I think we can assume that this lawyer talked to his client.

QUESTION: The -- the post-conviction proceeding extended over a period of 5 months. How many trial days were there?

MR. BAIR: There were 7 days, Your Honor, where testimony was taken in those 5 months --

QUESTION: So it had recessed and then resumed --

MR. BAIR: Yes.

QUESTION: -- several times.

MR. BAIR: Yes, several times. It was --

QUESTION: Mr. Bair, you -- you seem to accept that -- that all that he knew was as it was reported in other people's reports. But I just don't read the text that way. He said, at least I knew that as it was reported in other people's reports. And the that in that transcript is that he was borderline mentally retarded.

MR. BAIR: I agree.

QUESTION: That is the only thing that he said he got from other people's reports.

MR. BAIR: I agree. I think --

QUESTION: We don't know where he got all of the other information that he said he had.

MR. BAIR: No, but I think logically, going back to the reports of sexual abuse, there's only one person that could have come from because even the Selvog report, which is what post-conviction counsel prepared -- Selvog testified at the post-conviction hearing that his sole source for the information about Wiggins' sexual abuse was from Wiggins himself.

Now, Wiggins obviously spoke to his attorney. He spoke to the psychologist who interviewed him. He spoke to the criminologist that trial counsel hired. Clearly, I think an inference can be drawn that Wiggins reported that sexual abuse either directly to his attorney

or to the criminologist or to the psychologist.

QUESTION: And in your view on page 137a of the transcript, all of those matters are comprehended in this question and this answer toward maybe -- 10 lines from the top. You also knew that there were reports of sexual abuse at one of his foster homes? Yes.

MR. BAIR: Yes.

QUESTION: So the term -- the word reports there means that he relied on things other than that are in the lodging.

MR. BAIR: Yes, I think so, Your Honor.

QUESTION: To your knowledge -- and this is quite important to me. I'm just trying to find out what the -- if they were not referring to the lodging which contains the reports, if they were not`referring to that document, they must have been referring to or they were referring to Wiggins' own statements.

MR. BAIR: Either Wiggins' own statements or the reports of the other experts in the case.

QUESTION: Other experts in the case.

MR. BAIR: Right. There was --

QUESTION: He would have gotten them from?

MR. BAIR: From Wiggins.

QUESTION: After the trial was over.

MR. BAIR: No, no, Your Honor.

QUESTION: Before, before.

MR. BAIR: This was all going on --

QUESTION: That's the criminologist and the --

MR. BAIR: Yes, yes. And those reports were prepared before trial or between trial and sentencing. There was a 2-and-a-half month postponement between the time of this trial and the time of the sentencing.

QUESTION: All right. So the words, other people's reports, could have meant Wiggins told me or an expert whom I hired who talked to Wiggins told me.

MR. BAIR: Yes.

QUESTION: Yes, okay.

MR. BAIR: Or I guess the only -- the only other --

QUESTION: That -- that he wàs mentally retarded. It only goes to whether he was mentally retarded.

MR. BAIR: Yes.

QUESTION: I'm puzzled about another thing.

MR. BAIR: The only other --

QUESTION: Do those reports refer to sexual abuse?

MR. BAIR: Pardon me, Your Honor?

QUESTION: Do those reports refer to sexual abuse?

MR. BAIR: The only report that refers to sexual abuse -- now, the only written report that refers to sexual abuse is the Selvog report.

QUESTION: The what?

MR. BAIR: The -- the Selvog report was the one done by the social worker during post-conviction by -- by post-conviction counsel.

The psychologist's report was an oral report. So we don't really know exactly what he knew because there -- that was never reduced to writing.

QUESTION: Well, I'm still puzzled. Were there any written reports available to the lawyer that referred to sexual abuse that we know about?

MR. BAIR: No.

QUESTION: So then when he sàid you know that there were reports of sexual abuse at one of his foster homes, he was wrong.

MR. BAIR: No. I think he -- he was referring to -- he could have been referring to reports of Wiggins himself.

QUESTION: Oh, oh. I see what you're saying --

QUESTION: Oral reports.

MR. BAIR: Oral reports.

QUESTION: That -- that word reports does not mean written reports.

MR. BAIR: I don't think it has to refer to written reports, Your Honor.

The only -- just to follow up with Justice Breyer, the only other report was the pre-sentence investigation. That was the other written report that was available to counsel.

QUESTION: But that didn't have --

MR. BAIR: No, no, no.

QUESTION: I mean, what's worrying me obviously is we're -- we're turning an awful lot here on this word, other reports, which came in a fairly long hearing and which would normally be taken as referring to written reports, though it doesn't say that. And I'm -- that makes me concerned. I'm not sure where to go with it.

MR. BAIR: Well, I think two points, Your Honor. One, counsel did testify and it was undisputed -- it was never in any way negated through cross examination or any other vehicle -- that he knew of sexual abuse. In fact, he specifically answered the question, the more specific sexual abuse question, I knew about the Job Corps overture. So those answers are unequivocal and they stand in the record unchallenged.

QUESTION: Yes, but that's troubling because the Job Corps overture is -- is quite mild compared to the repeated days, months-on-end physical abuse suffered at

the hands of the stepfather.

MR. BAIR: I agree.

QUESTION: And it seems to me that this -- well, I'll ask you. Does this permit us to make the inference that if he had known this, he would have brought it out?

MR. BAIR: I think --

QUESTION: Because it's just very difficult to see why he would not have.

MR. BAIR: Well, I think he made a -- a reasonable tactical decision.

QUESTION: That goes to the tactical point.

MR. BAIR: I think he made a reasonable tactical decision. He had a powerful case. Under Maryland law, the jury had to find unanimously and beyond a reasonable doubt that Wiggins was the principal, that is, the actual killer in this case.

They also had to find unanimously and beyond a reasonable doubt that the murder and the robbery occurred at the same time, and there was evidence in this case. This was a very unusual situation in that it wasn't even clear whether the robbery occurred simultaneously with the murder. There was a -- there was a -- a huge dispute at trial and at sentencing over when Ms. Lacs was killed because her body was discovered on a Saturday. Wiggins was in possession of her car --

QUESTION: Mr. Bair, may I ask? Did counsel during the -- the sentencing hearing come up with a theory as to what happened other than that his client was the killer?

MR. BAIR: Yes, absolutely. He challenged and -- and very strenuously both during opening and -- and closing -- pointed out the evidence in the case that showed there were five fingerprints in Ms. Lacs' apartment that were not tied to anyone. There was a hat, some sort of a baseball hat, that was in the apartment.

QUESTION: No, I understand -- but did he -- did he suggest who they might have belonged to? Did he come up with a theory as to who --

MR. BAIR: No. I don't -- I don't think there was any particular person who was another suspect.

QUESTION: He didn't suggest that the man who lived downstairs might have been involved.

MR. BAIR: No. And that -- that was never challenged as part of any ineffective assistance of counsel in these proceedings, Your Honor.

QUESTION: Mr. Bair, what -- what do you respond to opposing counsel's argument that it doesn't matter because you didn't know until the eve of trial that you wouldn't have had a bifurcated proceeding, so you should have been doing this research in contemplation of a

bifurcated proceeding?

MR. BAIR: Well, Your Honor, first of all, of course, our position is they were doing it. They had, as -- as I said, lots of information. They were doing it. They were -- they were keeping that option open.

But another answer, Your Honor, is the evidence would not have been put on. The more evidence that -- that actually came out in -- in, you know, the proceedings, the details that we've now learned of through the Selvog report, they are so double-edged. They are so potentially harmful particularly in the context of this case. Between the Selvog report and the lodged materials, the DSS records, the -- the jury would have heard not just that Kevin Wiggins was -- had been in foster care and had a clean record, which is all they did hear. In addition, if those records had come in, they would have heard that he hated his biological mother, that he was in fights with other foster children, that he had once stolen some gasoline and tried to set fire to -- to a building, that he had a disturbed personality --

QUESTION: That all goes to explain why they wouldn't have put it in, but why didn't they put any of this in the proffer at the -- to the judge at the --

MR. BAIR: There -- there was no need to, Your Honor. There's no need under Maryland law to give a

detailed proffer. They -- they did not want to tip off the other side as to any potential things that might be negative to their client.

And again, to the degree that we don't know about the details, it -- it inures to the detriment of Wiggins. It was his burden to bring out all of this evidence and he didn't do it.

QUESTION: Does -- does the strength of the mitigating evidence have anything to do with whether a bifurcated proceeding is allowed?

MR. BAIR: No.

QUESTION: Would they have been more likely to get the bifurcated proceeding if they had come up with a lot of information about his childhood and so forth?

MR. BAIR: I don't believe sò, Your Honor. Of course --

QUESTION: What does it turn on then?

MR. BAIR: I think it was -- it was the trial court's discretion. I think it was just a -- this was back in 1989. There wasn't a lot of definitive law on it at the time. Since then, the Maryland Court of Appeals has said absolutely not.

QUESTION: Was there a transcript of that hearing? He just said, I want a bifurcated hearing and sat down, or did he say, I want a bifurcated hearing

because there's going to be very substantial mitigating evidence and I want the jury to consider that separately? What did he -- do we have a transcript of what he said here?

MR. BAIR: I think we do have a transcript, Your Honor, and my recollection is that there was a short discussion of it, not -- not a detailed discussion of it.

QUESTION: No, but if he had been in a position to make a strong proffer, why wouldn't he have made it? His case for a bifurcated hearing would have been stronger if he had had a strong proffer. Wouldn't it have been?

MR. BAIR: It would have been stronger, Your Honor, but I think in all likelihood if you look -- if you look at the Maryland sentencing law, it contemplates it, as I said, the court of appeals in Maryland has since held definitively. In fact, in the direct appeal in this case, in the Wiggins case itself on direct appeal, they have held that the Maryland sentencing procedure in capital cases requires that the jury go through certain steps, and those steps all have to be done at a unitary hearing. Obviously, there's a bifurcated guilt/innocence and sentencing.

QUESTION: Well --

QUESTION: Well, obviously, the -- the defense counsel didn't know until the motion was made and ruled

upon for a bifurcated hearing whether the judge would grant it, and there's no reason presumably that defense counsel should not have investigated the mitigating circumstances pending that ruling.

MR. BAIR: I agree.

QUESTION: And yet, we don't have a clear understanding of what he knew. And in fact, did not defense counsel tell the jury for sentencing that they would be hearing evidence about the defendant's background --

MR. BAIR: They -- they did --

QUESTION: -- at sentencing? And then nothing was put on.

MR. BAIR: No, not -- not really, Your Honor.

QUESTION: I mean, what -- what is the jury to make of that? It's so odd.

MR. BAIR: I don't -- I don't think so, Justice O'Connor. I think -- I think what counsel did is if you look at the essence of the -- the approach at sentencing, clearly it was we're contesting principalship. There was one comment about you're going to hear what a tough life he had.

Now, that was done I think for a couple reasons. One is counsel knew that petitioner could allocute and probably would allocute personally to -- to the -- the

jury.

They also knew that there was going to be a criminologist who was going to testify because the jury knew there was only two choices for this man, either life or death. That was -- and life without parole. But they knew it was either life or life without parole or death. And they were also putting on evidence by a criminologist that would show that Wiggins would adjust well to a life sentence. So I think they -- they also knew that -- that the pre-sentence report --

QUESTION: Thank you, Mr. Bair.

MR. BAIR: Thank you, Your Honor.

QUESTION: Mr. Himmelfarb, we'll hear from you.

ORAL ARGUMENT OF DAN HIMMELFARB

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MR. HIMMELFARB: Mr. Chief Justice, and may it please the Court:

The position of the United States is that the Sixth Amendment imposed no obligation to present evidence of petitioner's background at sentencing. It imposed no obligation to conduct a more extensive investigation of his background before sentencing. Those conclusions follow from a straightforward application of Strickland versus Washington which judges attorney performance by a

single standard, whether it was reasonable under all the circumstances of the case.

The decision to choose a principalship defense and to reject a mitigation defense falls comfortably within the wide range --

QUESTION: What's the bifurcated -- I've never heard of a bifurcated sentencing hearing. How does that work?

MR. HIMMELFARB: My understanding, Justice Breyer, is that the basis for the motion was that the principalship defense could be undermined by presenting the mitigating evidence, so they wanted to do it separately.

QUESTION: Right. So what do you do? You present the principalship defense and then the jury votes death or life, and then if they vote death, they go on and present the next one, and if the next jury or the same jury, having heard the other one, votes life, then it's life? I mean, I don't see how it works.

MR. HIMMELFARB: My understanding is that under the theory advanced by petitioner's counsel in support of the bifurcation motion, principalship alone would be determined at the first phase of the sentencing. If the jury found principalship, there would be a second phase at which counsel could --

QUESTION: Okay. Under those circumstances, they're saying that, obviously, in that motion he would have given everything he knew about the background since he thought it might work that way, and if he didn't, that's evidence, in fact, amazingly convincing evidence, that he didn't know. He didn't know about the sexual history.

And the main argument they're making has nothing to do with the strategic choice. It has to do with his failure to investigate.

So what's your -- what's your response?

MR. HIMMELFARB: If you look at the actual proffer that was made in support of the bifurcation motion, which is at pages 44 and 45 of the joint appendix, what counsel said was, I can proffer tò the court that in a non-bifurcated proceeding, the defense is in a position of coming forward with evidence regarding psychological history on Mr. Wiggins.

QUESTION: This is 40 -- page 44 of the appendix to the petition?

MR. HIMMELFARB: No, Mr. Chief Justice. It's the joint appendix.

QUESTION: Oh, the joint appendix?

MR. HIMMELFARB: Page 44 at the bottom.

I'm in a position to come forward with evidence

regarding psychological history on Mr. Wiggins, including aspects of his life history, including a diagnosis of a personality disorder, including diagnosis of some retardation. So --

QUESTION: So he says nothing whatsoever about the most frightful sexual abuse, about having the mother who did all the things that this one particularly did, not feeding them, burning their hands on the stove, et cetera. I won't list it. But I just don't see anything in the thing you've just read that suggests that he knew a single thing about that.

MR. HIMMELFARB: Well, it's true it was a general proffer rather than a highly particularized proffer.

QUESTION: Yes. And so their point is, obviously, if he had known about it, he would have said something, and the fact that he didn't say something, when coupled with the ambiguities on the pages, you know, 404 or 405 or 401-402 -- you get what we're talking about, the footnote -- coupled with that shows that the correct reading of that is he didn't know about it.

MR. HIMMELFARB: I think there's an important point to keep in mind here. The constitutional right petitioner has raised in this case is not the duty to know, it's the duty to investigate. The claim is that the

investigation was constitutionally inadequate.

And the other important thing to keep in mind is that there is significant evidence in the record that a significant investigation was done, an investigation which we think is constitutionally adequate.

QUESTION: Mr. Himmelfarb, in that connection, there's something I'd like you to set me straight on. There was a statement at some point that each of the defense counsel thought the other was going to bear the laboring awe in working up the mitigation case. Now, it seems to me that each one thought the other was doing it and the other wasn't doing it. That would be ineffective representation if each one thought the other was investigating and it turned out neither investigated.

MR. HIMMELFARB: I agree that would be problematic, but I don't think the record bears that suggestion out, again, going to the joint appendix.

QUESTION: Well, where -- where do I get that notion from that each one thought the other was principally responsible for working up the mitigation case?

MR. HIMMELFARB: Petitioner makes that argument in his brief, and there are record cites to support it. But we don't think the record cites do, in fact, support the notion that each counsel thought the other was

responsible for investigating the mitigation case.

There were two lawyers, Schlaich and Nethercott. At page 485 of the joint appendix, Schlaich testified that after he left the Baltimore County Public Defenders Office and went to another office, from that point forward his co-counsel, Ms. Nethercott, did most of the mitigation preparation with his guidance.

Then Ms. Nethercott testified at the post-conviction hearing as well, and her testimony was that she had no responsibility for retaining experts, that that was Schlaich's responsibility.

So I think that's a far cry from testimony by either that only the other one had responsibility for preparing the mitigation case. Each one was testifying about his or her particular responsibilities.

QUESTION: Yes, but where -- the page you refer to, he says, when asked what he did in -- in mitigation, he said, well, basically what we did in mitigation was attempt to retry the factual case and try to convince the jury on the principalship issue. That doesn't sound like the kind of mitigation we're talking about.

MR. HIMMELFARB: Well, that's right, Justice Stevens. It remains the case, though, that a substantial amount of investigation was done. That testimony --

QUESTION: But this part of the transcript

certainly doesn't support that proposition.

MR. HIMMELFARB: Well --

QUESTION: That's the part you called our attention --

MR. HIMMELFARB: -- in fairness to Mr. Schlaich, I think he was interpreting the question to mean what was your defense at sentencing, not so much what was your mitigation --

QUESTION: That's right. So this part does not support the -- the proposition that he did any mitigating research himself or with the other person. He's talking about the principalship issue.

MR. HIMMELFARB: I was just responding to Justice Ginsburg's question about whether it was true that each one testified that the other was responsible for the investigation. My only point is that I don't think the record bears out that suggestion in petitioner's brief.

QUESTION: But it also doesn't show that there was substantial investigation, which is what you went on to say, and I don't think it's supported.

MR. HIMMELFARB: I do, Justice Kennedy. The investigation that was done in this case by trial counsel was not materially different from the investigation that was done by post-conviction counsel. It was trial counsel, after all, who obtained the social services

records that documented a history of neglect. Trial counsel directed public defender investigators to go out and interview petitioner's family members, which they did. Trial counsel hired a psychologist to conduct clinical interviews of petitioner which were done.

Really the only difference between what trial counsel did and what post-conviction counsel did was that post-conviction counsel hired a social worker, a so-called mitigation specialist, who supervised the investigation and pulled the information together in a report.

But we're talking here about whether there is a constitutional deficiency in the investigation, and any difference in the two investigations, which is really the fact that the social worker was there in the one but not the other, we think can't have constitùtional significance.

I do want to say a little bit about the duty to present claim because most of the focus in the argument has been on the question of the duty to investigate.

We think that the principal defense was reasonable both because a finding of no principalship would have been an absolute bar to imposition of the death penalty and because the principalship case that the State put on here was so weak.

We also think it was reasonable not to present a

mitigation defense either in addition to the principalship defense or instead of it. It was reasonable not to present it in addition to the principal defense because it had a -- a very serious possibility of undermining it. It was reasonable not to present it instead of the principalship defense because mitigating evidence is just that. It's evidence that would be weighed against aggravating circumstances. It might or might not lead to a sentence of death.

A finding of no principalship is a categorical bar to imposition of the death penalty. If a single juror harbored a reasonable doubt about whether petitioner had carried out the killing himself, it would be obligated to return a verdict of life.

QUESTION: But presumably thè -- the determination of the facts about the murder was made in the trial when he was determined guilty or innocent, and they found him guilty. And so to try to redetermine that at sentencing and not to offer any evidence in mitigation, do you think we can say that's reasonable?

MR. HIMMELFARB: Absolutely. There were two different issues, one issue at the guilt phase, one issue at the sentencing, as far as the -- as far as petitioner's role is concerned. He was charged with first degree murder. As the jury was instructed, a conviction of first

degree murder does not necessarily encompass a finding of principalship, a finding that petitioner himself had carried out the killing. So it was perfectly understandable that petitioner's counsel would think that contesting principalship at sentencing would be a reasonable strategy.

QUESTION: Thank you, Mr. Himmelfarb.

Mr. Verrilli, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.

ON BEHALF OF THE PETITIONER

MR. VERRILLI: Thank you, Mr. Chief Justice.

I'd like to clarify the -- the facts surrounding the proffer because it's very important to understand how this unfolded.

Counsel for Wiggins made a mòtion. That motion was argued on October 11th, 1989 and denied at that time, the first day of the sentencing hearing. But the proffer was not made at that time. What -- what counsel for my friend, the United States, described was what Mr. Schlaich he would proffer if he had to proffer. He made the actual proffer at the end of the sentencing proceeding, and it can be found at pages, I think, 349 to 51 of the -- 348 to 51 of the joint appendix. And there's a lengthy proffer there of what he would have shown had he been able to put on his mitigation case in the -- in the method he wanted

to. So --

QUESTION: He does that -- he does that to argue --

MR. VERRILLI: He's making a record for --

QUESTION: -- after the fact that that the judge --

MR. VERRILLI: He's making a record for appeal, Justice Kennedy. Here's the -- here's what we would have suffered because we wouldn't have been -- we weren't able to put on all of this mitigating evidence, and here it is.

And so the sum total of his mitigation case is right there on the pages. He's described what it is and it contains nothing about the horrible abuse that this boy suffered. Nothing.

Now, with respect to the quesẗion of whose responsibility it was, I think it is correct to focus on the -- the colloquy on page 485 of the -- of the joint appendix, but the question asked Mr. Schlaich there, as Justice Stevens' question suggested, was, well, he first says, well, it was Ms. Nethercott's job to develop mitigation. And then the question put to him is what guidance did you give her, obviously, about how to develop the mitigation case. And he says, well, what we decided to do was retry the factual case. That's the -- that's what he says he gave as guidance with respect to

developing the mitigation case. So it's -- it's completely clear that this was neglect. They just dropped the ball.

Now, with respect to what they actually did at the sentencing proceeding, picking up on Justice O'Connor's questions, I think this is critical as well.

Remember, Strickland says no hindsight, but that's an argument that works against the government in this case because what these lawyers actually did was, in opening statement, invite the jury specifically to consider not only the facts of the crime but, quote, who this person is, said they would hear he had a difficult life. And then they didn't deliver on that promise.

But not only that, Dr. Johnson, the -- the criminologist, got up and testified, wèll, yes, violent people do tend to adjust well in prison. Well, that's not focusing on principalship. That, once again, is inviting the jury beyond principalship into the mitigation inquiry and giving them some reason to -- to mitigate, but of course, omitting all of the extraordinarily powerful reasons to mitigate that the social history shows.

And then third, there was as a matter of law in Maryland a pre-sentence report that had to go to the jury. And there was nothing that Wiggins' lawyers could do to stop that. And that pre-sentence report gave a highly

misleading and negative portrayal of Wiggins' background. And the -- what -- effect of what these lawyers did was to leave that unrebutted, further damaging Wiggins' prospects, further ensuring that he was going to get a death sentence.

Now, if I could conclude by just reminding this Court that very recently in the Miller-El case, this Court said even in the context of Federal habeas, the deferential review of Federal habeas, there's a difference between deference and abdication. And what my friends on the other side are asking for here is the latter. They are asking for abdication. They are asking this Court to uphold a judgment even though the only factual finding the Maryland Court of Appeals made was wrong by clear and convincing evidence, and even though that proffer demonstrates that Wiggins' lawyers did not do the work necessary and did not know the powerful mitigation case that could have been made to save this man's life.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Verrilli.

The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)